APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19902

CHAMBERSBURG BROADCASTING COMPANY, APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.

Appeal from a Decision and Orders of the Federal Communications Commission

Decided December 6, 1966

Mr. Harry J. Daly, with whom *Messrs. Leonard S. Joyce* and *George R. Borsari, Jr.,* were on the brief, for appellant.

Mr. William L. Fishman, Counsel, Federal Communications Commission, with whom *Messrs. Henry Geller,* General Counsel, and *John H. Conlin,* Associate General Counsel, Federal Communications Commission, were on the brief, for appellee. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before EDGERTON, *Senior Circuit Judge,* and DANAHER and LEVENTHAL, *Circuit Judges.*

DANAHER, *Circuit Judge:* This appellant is licensee of a Class II station, WCHA, which operates on 800 kc 1 kw, daytime only in Chambersburg, Pennsylvania. WCHA applied for a construction permit to increase its power to 5 kw.[1] Rejecting the recommendation of the Commission's

[1] Reese Broadcasting Co., licensee of station WCBG, filed a petition to deny the WCHA application. WCBG operating on 1500 kc at Chambersburg contended that the WCHA proposal would violate the Commission's 10 per cent rule, 47 C.F.R. 73.28(d)(3) (1965).

Hearing Examiner[2] while substantially adopting his findings of fact, the Review Board concluded that WCHA had failed to justify a waiver of the 10 per cent rule. Its decision released August 24, 1965, was made the subject of limited review after which the Commission on December 17, 1965 released its Memorandum Opinion and Order affirming the Review Board's Decision.

The appellant contends here that the Commission had acted unfairly since while denying the application of WCHA, increased facilities had been granted to its competitor, WCBG. We should note at once a fundamental difference between the proposals before the Commission. The WCHA application clearly involved a requirement that the applicant demonstrate justification for waiver of the 10 per cent rule with respect to WCHA's daytime only service. On the other hand, the WCBG application came squarely within an express exception embodied in the 10 per cent rule since WCBG was to provide a first local nighttime service to the community. Despite the contention of WCHA, we see nothing inherently unfair[3] in the Commission's recognition that the public interest would be served by a licensee which comes within the exception to the rule where another applicant for a different service has submitted a proposal in direct contravention of the stated purpose of the rule.[4]

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[2] The responsibility for the ultimate decision does not rest in the Examiner, of course. Cf. Lorain Journal Company v. F.C.C., 122 U.S. App. D.C. 127, 131, 351 F. 2d 824, 828 (1965).

[3] James S. Rivers, Inc., (WJAZ) v. F.C.C., 122 U.S. App. D.C. 29, 31, text and n. 3, 351 F. 2d 194, 196 (1965).

[4] Had WCHA really considered that it was being treated inequitably, it seems strange that no such argument had been raised before the Hearing Examiner or the Review Board. The contention was offered for the first time when WCHA filed before the Commission its application for review. Cf. Abacoa Radio Corporation v. F.C.C., —— U.S. App. D.C. ——, 358 F. 2d 849 (1966).

We deem unnecessary a detailed recital of the facts shown on the record before us. It may be noted that the WCHA proposal was found not to provide a first local transmission service and that it would not serve any "white" or "gray" areas. Moreover, the additional area and population proposed to be served by WCHA, its so-called "gain area" lay some 23 to 56 miles distant from Chambersburg. That area was bounded roughly by Harrisburg, only 12 miles from the area's northeast portion; by Altoona only 6 miles from its northwest sector; by Cumberland, Maryland, only 6 miles to the southwest; and by Hagerstown only 7 miles away to the south. The last three named cities each had three AM stations while Harrisburg had four. Some fifty stations, the Board had noted, serve parts of the gain area.

We have sought on several occasions to make clear our approval of the policy announced by the Commission as an expert body to be applied to its consideration of applications for waiver of the 10 per cent rule. Only where the circumstances are definitely unusual and it has been clearly demonstrated that the public interest requires such exceptional action is a waiver to be granted, the Commission has repeatedly stated. We have supported the Commission's position unless we have become convinced in a particular case that the Commission has acted arbitrarily or in violation of procedural safeguards.

Absent a demonstrable showing of invalidity in such particulars, we have pointed out[5] that where the Commission's action is supported in the record, we will not substitute our judgment for that of the body to whose expertise Congress has confided the decisional process.

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[5] Sayger v. F.C.C., 114 U.S. App. D.C. 112, 312 F. 2d 352 (1962); Sunshine State Broadcasting Co. v. F.C.C., 114 U.S. App. D.C. 271, 314 F. 2d 276 (1963); Guinan v. F.C.C., 111 U.S. App. D.C. 371, 297 F. 2d 782 (1961).

In our study of the record here, we have taken into account the several contentions urged upon us, but once again, we will be "slow to interfere."[6] We are satisfied that affirmance is clearly appropriate.

So Ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1966

No. 19,902

CHAMBERSBURG BROADCASTING COMPANY, APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.

Appeal from Decision and Orders of the
Federal Communications Commission

Before: EDGERTON, *Senior Circuit Judge,* and DANAHER and LEVENTHAL, *Circuit Judges.*

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision and orders of the Federal Communications Commission on appeal in this case are hereby affirmed.

PER CIRCUIT JUDGE DANAHER

Dated: December 6, 1966

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[6] Interstate Broadcasting Company v. F.C.C., 105 U.S. App. D.C. 224, 231, and see discussion at 227-229, 265 F. 2d 598, 605, and see discussion at 601-603 (1959).

APPENDIX C

The pertinent provision of the Communications Act of 1934, as amended, are as follows:

§ 303(g):

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall— . . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

§ 307(a):

The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

§ 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

APPENDIX D

The pertinent section of the Treaty, Agreement Between The United States of America And The United Mexican States Concerning Radio Broadcasting In The Standard Broadcast Band, January 29, 1957, 12 U.S.T. & O.I.A. 734, T.I.A.S., 4774 (effective June 9, 1961) is as follows:

Article II, B, 8, c.

Daytime Class II assignments by either Contracting Party on clear channels upon which the other Contracting Party has the Class I-A priority will be subject to the following conditions: . . .

(3) Permissible Power: . . .

(b) The United States of America may assign stations to operate with powers not in excess of 5 kw on the following channels: 730 kcs, 800 kcs, 900 kcs, 1050 kcs, 1220 kcs . . . . ."

APPENDIX E

47 CFR § 73.28(d)(3)

. . .(d) With respect to applications for new Class II-A Stations and other applications accepted for filing before July 13, 1964, the following shall apply: Upon showing that a need exists, a Class II, III, or IV station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour, subject to the following conditions: . . . . (3) The interference received does not affect more than 10 per cent of the population in the proposed station's normally protected primary service area; however, in the event that the nighttime interference received by a proposed Class II or III station would exceed this amount, then an assignment may be made if the proposed broadcast

station would provide either a standard broadcast nighttime facility to a community not having such a facility or if 25 per cent of more of the nighttime primary service area of the proposed station is without primary nighttime service.

47 CFR § 73.24 Note (b)

An authorization for a new standard broadcast station for increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

. . . .

(b) The proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree.